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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 670.

PEOPLES LOAN AND FINANCE CORPORATION,
Petitioner,

vs.

RAYMOND LAWSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI.

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STATEMENT OF THE CASE.

This suit is an action in trover brought by Raymond Lawson, the respondent, against Peoples Loan and Finance Corporation, the petitioner, to recover the value of eleven automobiles wrongfully converted by petitioner, and also to recover the rental value of the automobiles for the

period of time during which respondent was deprived of their use. Petitioner moved to add Georgia Casualty & Surety Company as a party plaintiff. Respondent is a citizen of Tennessee and petitioner a citizen of Georgia. Jurisdiction was based upon diversity of citizenship. The Surety Company is a citizen of Georgia.

The evidence showed that respondent had attempted to sell the automobile to a used car dealer and that the dealer had given worthless checks for the purchase price. The dealer transported the automobiles from Chattanooga, Tennessee, the place of the purported sale, to Rome, Georgia. There, petitioner seized the automobiles and sold them, claiming the right to do so under certain security instruments. The Surety Company had insured respondent for 95% of any loss due to the receipt of worthless checks, but had not insured respondent against loss by reason of the conversion of property nor for the loss of use of any converted property. The Surety Company paid respondent 95% of the value of the worthless checks and took a loan receipt from him, but paid him nothing for the hire of the automobiles during the time respondent was deprived of their use.

Prior to the trial on the merits and while the claim manager of the Surety Company was on the witness stand upon a hearing on petitioner's motion, the District Judge inquired whether the Surety Company was aware that the suit was pending and whether the Surety Company had any objection to the case proceeding "as it is proceeding". The claim manager replied that the Surety Company was familiar with the suit, with its right to claim its share of the proceeds of any judgment, and had no objection to the suit proceeding as it was proceeding (R. 52-53).[1] The

1. The transcript of record in the Court of Appeals will be so referred to.

District Judge overruled the motion to add the Surety Company as a party plaintiff. The jury awarded respondent a sum for the value of the automobiles and a sum for their hire. Upon appeal the Court of Appeals, with one Justice dissenting, affirmed, ruling that "a case was made out fully supporting, if not demanding, the jury verdict," and that the trial court had properly overruled the motion to add a party.

QUESTION PRESENTED.

Is it erroneous to deny a defendant's motion to compel the joinder of an additional party plaintiff where the original plaintiff is authorized by statute to bring suit in his own name; where the party sought to be added is not an indispensable party; where such joinder would deprive the Court of jurisdiction of the parties before it; and where the denial of the motion will not subject the defendant to any other suits arising out of the same claim?

ARGUMENT.

I.

There Is No Reason Why This Cause Should Be Reviewed by This Court.

A. Rule 17(a) of the Federal Rules of Civil Procedure Authorized Respondent to Bring the Suit Without Joining Georgia Casualty & Surety Company.

This is an action in tort for the wrongful conversion of personal property. Section 3-109 of the Georgia Code of 1933 provides that "an action for a tort shall, in general, be brought in the name of the person whose legal right has been affected, and who was legally interested in the property at the time the injury thereto was committed." The Georgia courts have interpreted this statute to mean that where an insurer has paid a part of a loss, the action must be brought in the name of the insured, and the insurer is not a necessary or proper party. *Atlanta Cadillac Company* v. *Manley*, 29 Ga. App. 522, 116 S.E. 35; *Crawford* v. *Hall*, 56 Ga. App. 122, 192 S.E. 231. In this case the Surety Company paid only a part of the respondent's loss, and would, at most, be only a partial subrogee.

Rule 17(a) of the Federal Rules of Civil Procedure provides:

> "Every action shall be prosecuted in the name of the real party in interest; but * * * a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought * * *."

Since the Georgia statute not only authorized, but required, Raymond Lawson to bring this suit in his name,

Rule 17(a) specifically authorized Raymond Lawson to bring this action without joining the Surety Company.

As the Court of Appeals' decision points out, it is also well established that where the insurer pays a loss or part of a loss, and takes a loan receipt, as was done in this case, the insured—not the insurer—is the real party in interest. *Green* v. *Johns et al.*, 86 Ga. App. 646, 72 S.E.2d 78; *Augusta Broadcasting Co.* v. *United States*, 170 F.2d 199 (C.A. 5); *Luckenbach* v. *McCahan Sugar Ref. Co.*, 248 U.S. 139, 148, 149.

Under the law applicable in this case Raymond Lawson was entitled to bring this action in his own name without joining the Surety Company. Accordingly, the motion to add the Surety Company as a party plaintiff was properly denied, and the decision of the Court of Appeals upholding that ruling was correct.

B. Rule 19(b) of the Federal Rules of Civil Procedure Required the Denial of Petitioner's Motion to Add a Party Plaintiff.

Even if this Court should consider that Rule 17(a), taken in conjunction with Section 3-109 of the Georgia Code and the cases cited which deal with loan receipt transactions, did not alone justify the denial of the motion, it is clear that Rule 19(b) required the denial of the motion.

Rule 19(b) permits the court to order persons "who are not indispensable" made parties if they "can be made parties without depriving the Court of jurisdiction of the parties before it." Petitioner concedes that the Surety Company was a Georgia corporation. No contention has been made that the Surety Company was an indispensable party, and it clearly was not, being at most, only a partial subrogee. The Surety Company would, at most, be only

a "proper" or "necessary" party and not an "indispensable" party. In the opinion of this Court in *United States* v. *Aetna Casualty & Surety Company*, 338 U.S. 366, 382, it was said that in cases of partial subrogation:

> "Although either party may sue, the United States upon timely motion, may compel their joinder • • •. Both are 'necessary' parties Rule 19(b), Federal Rules of Civil Procedure."[19]

In footnote 19, to the above quoted portion of its opinion, this Court stated:

> "They are clearly not 'indispensable' parties • • •."

This Court cited on this point: *3 Moore, Federal Practice*, 2d Ed., p. 2178, where it is said:

> "Both the partial assignor and the partial assignee of a chose in action are necessary parties to a suit on the chose, but not indispensable for a complete decree can be given at the suit of either alone."

The meaning of Rule 19(b) is that if a "necessary party" is not "indispensable" and "his joinder would oust the Court of jurisdiction, as where his joinder would destroy diversity of citizenship, he need not be made a party." *3 Moore, Federal Practice*, 2d Ed., p. 2206. *Norton* v. *United Gas Corporation*, 1 F.R.D. 155 (W.D. La.).

The Surety Company's appearance as a party plaintiff would have destroyed the diversity of citizenship and the basis of Federal jurisdiction, because one of the plaintiffs, and the defendant, would have been citizens of the same state. *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 17.

Since under Rule 19(b), the court may make a person a party only if it can do so "without depriving the Court of jurisdiction of the parties before it," the District Court

very clearly could not lawfully have granted the motion. Obviously the Court of Appeals was correct in holding:

> "If, therefore, it could be claimed that Georgia Casualty and Surety Company was a proper or necessary party, it certainly was not indispensable, and since its joinder would have ousted the jurisdiction of the Court, the refusal to join it could not have been error."

Petitioner made no motion to dismiss the action (there being no grounds for such a motion). The petitioner's contention is that the motion to make the Surety Company a party plaintiff should have been granted, and it obviously could not have been granted except in violation of Rule 19(b).

C. The Decision in This Case Is Not in Conflict with Any Decision of This Court or with Any Decision of Another Circuit Court of Appeals.

The judgment sought to be reviewed is not in conflict with *United States* v. *Aetna Casualty & Surety Company*, 338 U.S. 366. The judgment sought to be reviewed deals with a distinctly different question.

The *Aetna* case dealt with the question of whether, under the Federal Tort Claims Act, a workmen's compensation insurance carrier which had become subrogated to its insured's claim could bring suit in its own name against the Government. This Court ruled that such suit was permissible. This Court also stated that where the insurance company was only a partial subrogee, both it and the insured could sue and if only one sued, the Government could compel the joinder of the other.

The *Aetna* case does not hold that a motion to add a non-indispensable party plaintiff under Rule 19(b) should be granted even when to do so would deprive the Court

of jurisdiction of the parties already before it. That is the prime question here. No such question was before this Court in the *Aetna* case. However, as pointed out above, this Court in the *Aetna* case did state that the partial subrogee of a claim against the United States clearly is not an indispensable party.

It seems clear from the *Aetna* case and others which have followed it that the right of the Government to require both the insured party and the partial subrogee to be joined is for the sole purpose of allowing the Government to avoid the expense and inconvenience of being required to defend a number of separate suits arising out of a single claim. See *Yorkshire Ins. Co.* v. *United States*, 171 F.2d 374, 376 (C.A. 3). In this case there is no possibility that the petitioner will be required to defend more than one suit because of its conversion of the eleven automobiles belonging to respondent. The law of Georgia required respondent to bring this action in his own name for the entire claim. His recovery is subject to the claims of the Surety Company under Georgia law.

The petitioner is doubly protected against the assertion of a separate claim by the Surety Company. Not only is it protected from such claim by the substantive law of Georgia, but also by the action of the District Court as well. At the last hearing on the petitioner's motion to add the party plaintiff, the District Judge questioned the claim manager of the Surety Company who was then on the witness stand (R. 53). The Judge asked if the Surety Company was familiar with the fact that the suit was pending and whether the Company realized it had the right to intervene and interpose a claim on the proceeds in the event of a recovery by respondent. The claim manager stated that the Surety Company did understand that. The Court also asked if the Surety Company had

any objection to the case proceeding "as it is proceeding", to which the claim manager replied in the negative.

Thus, there is not even a remote possibility that petitioner will be met with any other suit by the Surety Company. Although Rule 19(b) did not permit the granting of petitioner's motion, the substantive law of Georgia and the District Court's action gives the petitioner every protection which that Rule could afford. The ruling could not have prejudiced petitioner.

Petitioner incorrectly asserts that *State Farm Mutual Liab. Ins. Co.* v. *U. S.*, 172 F.2d 737, 739 (C.A. 1); *Yorkshire Ins. Co.* v. *United States*, 171 F.2d 374, 376 (C.A. 3); *National Garment Co.* v. *New York, C. & St. L. R. Co.*, 173 F.2d 32, 34 (C.A. 8); and *Gas Service Co.* v. *Hunt*, 183 F.2d 417 (C.A. 10), are in conflict with the decision of the Fifth Circuit Court of Appeals in this case. None of those cases involved a ruling on the question here presented. The prime question here presented is whether the District Court erred in denying a motion to make the Surety Company a party plaintiff when to do so would have deprived the Court of jurisdiction over the parties already before it. No such question was presented in any of the Circuit Court decisions cited by petitioner.

Petitioner cites no cases (and it is believed there are none) holding that a person who is not an indispensable party and whose presence would oust the court of its jurisdiction must be made a party. Rule 19(b) itself provides the direct converse. *Woods* v. *First Nat. Bank*, 16 F.2d 856, 858 (C.A. 9), relied upon by petitioner, does not so hold, but on the contrary holds that Federal jurisdiction cannot be obtained by omitting "a necessary *and indispensable* party, whose presence would defeat jurisdiction" (italics supplied). The correct and universal rule

is stated in *3 Moore, Federal Practice*, 2d Ed., pp. 2206-2207, to the effect that a non-indispensable party need not be made a party if his joinder would oust the Court of jurisdiction.

CONCLUSION.

For the reasons herein set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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